No. 88-1971

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NICHOLAS NEU,

Petitioner,

—against—

JAMES P. CORCORAN, Individually and as Superintendent of Insurance of the State of New York and JAMES W. RANDOLPH, Individually and as Deputy Superintendent of Insurance of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2664

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

FREDERIC L. LIEBERMAN
AUGUST L. FIETKAU (Counsel of Record)
Assistant Attorneys General
Of Counsel

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Question Presented

Whether the court of appeals correctly held that it was not clearly established in 1987 that defamatory remarks by governmental officials which prevented petitioner from pursuing his occupation constituted a deprivation of liberty without due process under *Paul v. Davis*, 424 U.S. 693 (1976)?

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Statement of the Case

Between February 1985 and March 11, 1987, the plaintiff, a businessman, was the president of a New York corporation which sold pre-paid automobile collision repair contracts to the public. (A-12). In January, 1987, the New York State Supreme Court held, in a proceeding brought by the New York State Department of Insurance, that petitioner's corporation was engaged in the sale of insurance without being licensed to do so

by the Superintendent of Insurance and enjoined further sales. This injunction was affirmed on appeal. (A-12).

Petitioner claims that in June 1987, at a convention of state insurance commissioners, the Superintendent and a Deputy Superintendent made defamatory remarks concerning petitioner's operation of the New York corporation. (A-13). Petitioner then commenced this action, asserting defamation claims, pursuant to 42 U.S.C. § 1983 and state law, against the respondents. Petitioner did not claim that the alleged defamation was in connection with his termination from any government employment, since he held no such position, or with his loss of some statutory right or legal status, such as the loss of a license to sell insurance, since he was not licensed in New York. Rather, petitioner claimed consequential damages, contending that, as a result of the alleged defamation, "his reputation was ruined and he was forced out of the automobile repair business, which was his sole livelihood." (A-13).

The respondents moved to dismiss the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., asserting that it failed to state a claim upon which relief could be granted and that respondents were immune from liability under federal and state law. (A-13). The district court denied the motion in all respects. (A-1-A-10). The respondents appealed to the court of appeals pursuant to 28 U.S.C. § 1291 from the denial of their qualified immunity defense to the section 1983 claim. (A-13).

The court of appeals unanimously reversed the district court and directed a dismissal of the complaint on the basis of respondents' qualified immunity. Applying *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. ____, 107 S. Ct. 3034 (1987), the court of appeals held that the respondents were entitled to a dismissal because it would not have been known to a reasonable person that it was "clearly established in 1987 that [respondents'] alleged actions constituted a deprivation of a protected liberty interest." (A-15). The court noted that, while this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), held that something more than stigmatic injury flowing from defamation by governmental officials was

required in order to constitute the deprivation of a constitutionally protected liberty or property interest, it was unclear under *Paul* and its progeny in the Second Circuit in 1987, when the alleged defamation took place, what actions by governmental officers would satisfy the *Paul* "stigma-plus" test for liability under section 1983. (A-17-A-18). Specifically, it was unclear whether the "plus" could be satisfied by the deprivation of the ability to engage in any of the common occupations of life, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), or only by dismissal from a government job or deprivation of some other legal right or status. (A-18-A-19).

While noting this uncertainty, the court nevertheless stated that:

> *Paul* * * * strongly suggests that defamation, even if it leads to a significant loss of employment opportunities, is not a deprivation of a liberty interest unless it occurs in the course of dismissal or refusal to rehire * * * a government employee or during termination or alteration of some other legal right or status. Otherwise, *Paul* suggests, a defamation is merely a tort, cognizable at state law, but not a constitutional deprivation.

(A-18).

After reviewing its prior decisions (A-18-A-21), the court of appeals concluded that it did not believe "that the law of this Circuit clearly establishes that the governmental defamation alleged by Neu rises to the level of a constitutional violation, rather than simply a state law tort." (A-21-A-22) (footnote omitted). The court found that the alleged defamation "did not occur in the course of dismissal from a governmental job, nor did it come in the course of termination by New York of any legal right or status enjoyed by Neu." (A-22) (footnote omitted). Accordingly, the court held that respondents were entitled to qualified immunity with respect to Neu's federal claim. Having so ruled, the court held that it would be inappropriate to exercise jurisdiction over the pendent state claim and directed dismissal of the entire complaint. (A-22).

Reasons For Denying The Writ

THE PETITION HAS FAILED TO MEET ANY CRITERION WHICH WOULD WARRANT THE GRANTING OF THE WRIT.

The opinion below applied and is consistent with holdings of this Court and is not in conflict with any holding on the issue by any United States Court of Appeals.

A. The Qualified Immunity Issue

The court below, accepting the petitioner's allegations as true, dismissed his section 1983 liberty interest defamation claim on the basis of the respondents' qualified immunity as public officers, holding that respondents "are entitled to immunity because our prior cases have not clearly established that [respondents'] conduct deprived [petitioner] of a liberty interest protected by the due process guarantees of the Fourteenth Amendment." (A-12). The court of appeals, applying the criteria delineated in *Anderson*, 107 S. Ct. at 3039, concluded that "we do not think that the law of this Circuit clearly establishes that the governmental defamation alleged * * * rises to the level of a constitutional violation, rather than simply a state law tort." (A-21-A-22). In dismissing the action on the basis of qualified immunity, the court held that it was unnecessary to decide whether petitioner's alleged liberty interest deprivation stated a viable section 1983 claim under current law. (A-15).

The court of appeals, recognizing that under *Anderson* a qualified immunity dismissal is not warranted simply because "[t]he very action in question" has not previously been held unlawful, concluded that in light of prior decisions in the circuit, it would not have been apparent to a reasonable person in 1987 that the kind of injury of which petitioner now complains of amounted to a section 1983 liberty interest deprivation. (A-14). In analyzing prior decisions in the circuit which applied this Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976), the court below noted that its prior decisions left it unclear "that defamation occurring other than in the course of dismissal" from gov-

ernment employment or the termination of "some other legal right or status" would amount to a deprivation of a constitutional liberty interest. (A-19).

The petitioner here does not contend that in the context of the alleged defamation he was terminated from government employment or that any legal status had been terminated. Rather, he claims only that the alleged defamation deprived him of the ability to pursue his business or occupation. This Court's decision in *Paul* makes clear that petitioner's claim does not rise to the level of a constitutional wrong. In discussing the prior cases which formed the basis for its holding, this Court in *Paul* stated that it is the act of "officially" removing a right or status previously recognized by the state which implicates the due process clause. 424 U.S. at 711. Thus, under *Paul*, stigma which only has a practical impact upon one's ability to practice one's profession cannot be the basis of a due process claim.

Consistent with this language in *Paul*, the decisions of the Second Circuit do not establish, much less clearly establish, that petitioner's allegations were sufficient to state a claim. (A-19-A-22/23, n.2). Thus, while the court of appeals had sustained section 1983 defamation claims which were connected with the plaintiff's termination from government employment, *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1978), *cert. denied*, 430 U.S. 929 (1977), and *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), it had dismissed the section 1983 claim of a school teacher who alleged the defamation occurred when she was no longer a governmental employee, *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977). In *Baden v. Koch*, 799 F.2d 825 (2d Cir. 1986), the court dismissed the complaint of a government employee who was only demoted in the context of an alleged defamation. In *Rudow v. City of New York*, 822 F.2d 324 (2d Cir. 1987), which was decided in the month following the alleged defamation of petitioner, the court dismissed the defamation claim of a private businessman who did not claim that he suffered a loss of public employment or that he had been barred from practicing his profession. To the extent that the opinion may have hinted that if

Rudow had alleged that the defamation deprived him of the ability to practice his profession, he might have been able to recover, the opinion was, as petitioner himself recognizes (Petition at 11), mere dictum.

None of these cases made it clear in June 1987 that a plaintiff, such as the petitioner here, who merely alleges injury flowing from an alleged defamation, not connected with a loss of government employment or termination of any pre-existing statutory or legal right, had a viable section 1983 claim.

Petitioner incorrectly contends (Petition at 8) that this case presents an issue which has divided the circuits, warranting review here. Specifically, he contends that the decisions are "in conflict" as to the circumstances under which damage to business and reputation satisfy the liberty interest "plus" element of a *Paul* defamation claim. (*Id.* at 12).

First, the court below did not decide what kind of injury would satisfy the stigma-plus test of *Paul*. Indeed, the court specifically stated that it was not deciding that issue: "Whether or not the District Court is correct that Neu adequately alleged deprivation of a liberty interest to state a claim for relief under 42 U.S.C. § 1983, [is] a matter we do not decide. . . ." (A-15). All the court below decided was that the law on the issue was unclear in the Second Circuit in 1987. Such a holding is not in conflict with any other decision of the Second Circuit or of any other circuit.

Second, if petitioner were correct in contending that the circuits are in conflict on the question of what satisfies the stigma-plus test of *Paul*, he would merely be demonstrating that even today the law remains unclear and that the court below was correct in dismissing the complaint.

Third, as the court of appeals opinion demonstrates (A-23 n.2), petitioner is in fact unable to draw support from the opinions of other circuits.[1]

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1 The only direct authority petitioner cites for the alleged conflict in the circuits is *Little v. City of North Miami*, 805 F.2d 962 (11th Cir.

B. The Appealability Issue.

Petitioner contends that a second issue warranting review arises from the court of appeals' exercise of jurisdiction over the appeal. He claims that the court of appeals should have dismissed the appeal because respondents will in any event be subject to trial in state court under state tort law. He argues (Petition at 15-18) that the theory behind collateral order appeals on the issue of section 1983 qualified immunity—to shield public officers from baseless litigation and from personal monetary liability where they could not reasonably have known that their conduct was unconstitutional—is inapplicable where those public officers are still subject to suit in state court. Petitioner's argument is without merit.

First, there is no assurance that respondents will have to face a state court trial following dismissal of the federal action. If a new action is commenced in state court, the trial judge may not adhere to the district court's ruling rejecting respondent's state law immunity defense, and if he does, the ruling would be appealable as of right. N.Y.C.P.L.R. § 5701(a)(2)(iv),(v); *Kearney v. Atlantic Cement Co.*, 33 A.D.2d 848 (3d Dept. 1969).

Second, even if respondents would have to face a state court trial, they still should be afforded an immediate appeal of the order rejecting their qualified immunity defense. As petitioner

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1986). In that case, the court, relying on *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and other eleventh circuit cases, upheld the section 1983 claim of a law professor involving defamation unconnected to government employment. The court there held that a claim of damage to the goodwill of one's business met the stigma-plus test of *Paul*. However, under Florida law a businessman possessed a *statutory* right to his reputation and good will. *Rudow*, 822 F.2d at 330 (distinguishing *Marrero* as a case where the stigma-plus test of *Paul* was met because the plaintiff had an "affirmative property right to business goodwill created by Florida statute"); *see Paul*, 424 U.S. at 711-12. Thus, in Florida such a defamation meets the stigma-plus test because it results in a deprivation of a statutory right or status. Petitioner claims no similar statutory right in New York.

recognizes (Petition at 15), this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), permitting interlocutory appeals from orders rejecting a qualified immunity defense, protects state officials from the substantial distractions presented by a lawsuit. *See id.* at 526. Denying an appeal simply because the defendant might yet face a state trial would severely undermine *Mitchell* by creating the possibility that the defendant might have to face lengthy federal *and* state litigation instead of just a state trial. This would occur where, after a district court rejects a qualified immunity defense, subjecting a defendant to extensive discovery, the court dismisses the federal claim on a summary judgment motion and simultaneously dismisses the pendent state claim. *See Carnegie-Mellon University v. Cohill*, ____ U.S. ____, 108 S. Ct. 614, 619 (1988) (dismissal of pendent state claims is generally appropriate when the federal claims are dismissed before trial). If the plaintiff then commenced state court litigation, the governmental official would be compelled to defend himself a second time against the same basic claim. The prospect of such duplicative litigation,[2] with its attendant infringement upon a government official's ability to discharge his official duties, is avoided by permitting the official to take an immediate appeal from the denial of his qualified immunity defense.

Petitioner's argument, if accepted, would defeat a collateral appeal under *Mitchell* whenever a plaintiff pends a state claim to his Section 1983 claim.[3] Petitioner has failed to demonstrate the wisdom of such an approach or to cite to any decision which supports his position. The issue does not warrant review.

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2 This Court has held that "even such pretrial matters as discovery are to be avoided if possible, as [i]nquiries of this kind can be peculiarly disruptive of effective government." *Mitchell*, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)).

3 Contrary to petitioner's suggestion (Petition at 17), this Court has held that a showing that conduct is unlawful under state law does not defeat a qualified immunity defense to a section 1983 claim. *Davis v. Scherer*, 468 U.S. 183 (1984).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
July 3, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2664

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

FREDERIC L. LIEBERMAN
AUGUST L. FIETKAU (Counsel of Record)
Assistant Attorneys General
Of Counsel